COMPETITION POLICIES AND LAWS:

Major Concepts and an Overview of Ethiopian Trade Practice Law

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Introduction

Competition policy and law appertain to market and/or market reform which has become an important ingredient of the democratic process*[1] in countries which are in transition from authoritarian systems to a liberal democracy. Furthermore, competition and/or competition law are not only concepts of law but have become important yardsticks of economic development.

It goes without saying that a meaningful implementation of the competition regime requires putting in place not only a proper and adequate competition law, but it also needs the establishment of an autonomous and capable competition authority. The first part of this article deals with concepts and principles related to competition policies and laws, and in the second part a modest attempt has been made to appraise the Ethiopian situation in light of what has been addressed in the first part.

Part I- Competition Policy and Law

1. Competition Policy

It is maintained that an appropriate competition policy has to include both micro economic policies and Competition law.[2] The phrase: *"competition policy*' consists of two terms, i.e., *competition* and *policy* which must be first treated separately and then jointly for the sake of proper understanding of what is behind the phrase.

In the corporate world, competition is taken as a process whereby firms strive against each other to secure customers for their products.[3] In market economies, competition refers to a situation where sellers strive for buyers' patronage with a view to achieving certain business objectives like profits, sales or market share. This can be associated with rivalry in terms of price, quality, service or combination of these and other factors that are valued by custom-

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[1] Andrew, Heywood; *Politics,* 2nd Edition (Palgrave, India, 2002) p. 81

[2] Cuts, *All About Competition Policy and Law for the Advanced Learner* (KBS Printers, India, 2000), 17

[3] Ibid; 1

ers.[4] On the other hand, policy refers to the general principles by which a government is guided in its management of public affairs.[5]

A businessperson or business firm competes to excel or to take the place of its rival, and under certain circumstances, the competitions may even involve attempts towards elimination. It is at this juncture that laws and policies intervene to regulate the avenues and modalities of the competition so that the public at large and the business community can ultimately benefit from predictable and enforceable rules of conduct within the framework of free competition.

Generally, business firms adopt two methods to out compete with others. One of these methods is *fair* and it is realized through means such as producing quality goods, becoming cost efficient, adopting the best technology, investing in research and development oriented activities. Under fair competition, firms do their best in terms of innovation, choice, quality and services to attract their customers.[6] On the contrary, the practices referred to as *'unfair methods"* involve the adoption of restrictive business practices such as predatory pricing, exclusive dealing, forming cartels and the like[7] rather than focusing on innovation, choice, quality and services.

Fair business practices can be associated with antimonopoly business behaviors and the unfair business practices with manifestations of monopolies, which are connected with scarcity of goods, poor quality, high prices, unresponsiveness to consumers, unreasonable, irrational, or incomprehensible terms of dealing, an arbitrary and highhanded attitude.[8] Usually, markets are far away from what is called perfect competition where a large number of firms produce homogeneous goods, fix one price, where the entry and exit are free and easy, where there is a perfect mobility of all players in the market and where all the buyers and sellers have perfect information of the conditions of the market.[9]

The notion of free market at its face value signifies that market forces should have a predominant role in the operation of the market. However, this should not imply that free market does not need a policy direction. Nor should the notion totally rule out the intervention of government. Perfect competition is simply a theoretical assumption, and it is to be noted that market imperfec-

[4] The World Bank and Organization for Economic Cooperation and Development (OECD), A Framework for the Design and Implementation of Competition Law and Policy (U.S.A, 1998), 1

[5] Black's Law Dictionary, 8th Edition

[6] Supra note 2, P.1

[7] Ibid

[8] Craig W, Conrath; *Practical Handbook of Antimonopoly Law Enforcement for Economies in Transition of Development* (2003), XVI

[9] Supra, note 2, at.3

tions and restrictive business practices are prevalent in market situations many of which are man-made. Government intervention in markets, mainly through competition policies is unavoidable because governments intervene in markets mainly through competition policies.

Competition policy refers to those governmental measures that directly affect the behavior of enterprises and the structure of industry.[10] As indicated above, an appropriate competition policy includes both *micro-economic policies* and *competition law.* Some of the microeconomic policies induced by the government have an important impact on competition and hence on the economy of developing or transitional economies. These economies are characterized by high level of public ownership, government intervention, importance of agricultural and service sectors with comparatively small industrial sectors, concentration of production in one or small number of commodities, small formal private sector, a large informal sector and dependence on imports for manufactured goods.[11]

The *first* governmental measure that has a bearing on competition, especially in transitional economies, is privatization and it refers to the transfer of ownership and management responsibility from the state to the private sector.[12] The *second* pertains to liberalization of trade wherein an attempt is made to expose protected domestic industries and services to competition from abroad.[13] The *third* measure is about relaxing foreign investment and ownership requirements whereas the *fourth* measure refers to economic deregulation.[14] In due course of a shift towards market economy, regulations like price controls and institutions like marketing boards phase out in many countries where companies are allowed to have more freedom in their decisions over pricing and production.[15]

It must be emphasized that an effective competition policy is especially essential for transition economies because their capital markets are often not as effective as those in developed countries. Moreover, they have significant import restraints, and government organs play a dominant role in setting prices and in making other vital decisions in addition to which they are highly affected by the culture of collusion rather than by competition. [16]

[10] Ibid; 17

[11] Cuts, Towards a Healthy Competition Culture ... (Jaipurs Printers P. Ltd, India, 2005), p. 5

[12] Ibid; 9

13 TU; A

[14] Ibid

[15] Ibid

[16] Robert H. Lande, *Creating Competition policy for Transition Economies,* Brook. J. Int'l law [Vol xxlll] P. 347

2. Objectives of Competition Policy

Competition policies of different countries have different objectives. This is so because there are different political systems with different economic goals and competition policies are mainly reflections of these political systems.[17] Proper understanding of the objectives of competition policy is thus important to comprehend the nature of monopoly and the problems caused by it.

In a *monopoly market form* there is generally only one firm in the concerned industry and there are no close substitutes for the product of the monopolist.[18] Close substitutes are goods or services that are considered to be economically inter-changeable by buyers.[19] Since there are no close substitutes of the product available, competition is absent in this market form.[20] What follows from the absence of competition in the monopoly market form is that the monopolist is a price maker and therefore can fix the price and allow demand to determine output, or set output and allow demand to set the price.[21] [22] There are adverse effects that ensue from this market form. Some of these are the tendency to reduce output, to increase price and to reduce the quality or the ser-

By its very nature, competition policy aims at fighting monopolies and thus preserving free competition. One of the major objectives of competition policy is the protection of the consumers' interest.[23] There are three approaches in the protection of consumers' interest:

a) The thrust of the first approach, which is associated with the Chicago school, is that it ignores consumers' interest and focuses solely on *social welfare and economic efficiency*.[24] This approach has little support among policy makers and the society at large because it ignores the protection of the consumers' interest.[25]
b) The second approach recognizes the immediate and short term interests of consumers as the primary aim of competition policy. [26]
c) According to the third approach the protection of interest of consumers is essentially a long term goal, and its immediate concerns are to be subordinated to the welfare of the society as a whole.[27]

[7] Czeres, The Controversies of the Consumer Welfare Standard, Competition Law Review, March 2007,(http://www.global competition policy. Org)

[18] Supra, note 2, P.4

[19] Ibid, endnote 4, P.55

[20] Ibid, 4

[21] Ibid

[22] Supra, note 8, P 1-19

[23] Supra, note 11, P.13

[24] Supra, note 17, P 125

[25] Ibid

[26] Ibid

[27] Brodly, *The Economic Goals of Anti-trust Efficiency,* Consumer Welfare and Technological Progress (1987) NY Univ LR, supra note 17, P.125

It is a point of consensus that no democratic government would viably afford to impose competition policy that solely focuses on efficiency or on social welfare. It has to consider the interest of consumers.[28] But how does competition policy protect the interest of consumers?

Competitive market forces business enterprises to do their best to attract and retain their consumers. Towards this end, enterprises have to strive towards excellence in innovation, choice, quality service and price.[29] Competition, in effect, offers a greater choice of products at lower prices because of the fear that only the fittest will survive in the market.[30] Consumers are better off under such setting because purchasing power of consumers increases as a result of lower prices,.

For example, an Ethiopian farmer who used to buy battery cells for 5 Birr each saves Birr 3 if, due to competitive market, the price comes down to Birr 2 each. The farmer can thus use the margin to buy something else. But we don't have to forget that business firms are consumers too. In their business activities they purchase the products of other firms as their inputs and the price and quality of these inputs partly determine their own competitiveness and profits.[31]

An equally important objective of the competition policy is that it stimulates efficiency and competitiveness across the economy.[32] Economic efficiency would be taken as an encouragement of allocation and dynamic efficiency that could be materialized through lowered production costs and technological change and innovation.[33]

Yet, the most common objective of competition policy is the maintenance of the competitive process or of free competition. As this objective is the stepping stone for the other objectives, it aims at striking down or preventing unreasonable restraints on competition.[34] The Supreme Court of U.S.A in its decision in the case between *Northern Pacific Railway Co. v. United States* (1958) aptly summarized the objectives of competition policy. It stated:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time pro-

[28] Supra, note 17, p.127

[29] Supra, note 2, p.6

[30] Cuts, *Competition Policy and Law Made Easy* (Jaipur Printers P.ltd, India, 2001) 1

[31] Supra, note 11, p 13

[32] Ibid

[33] Supra, note 4, p. 3

[34] Ibid, p. 2

viding an environment conducive to the preservation of our democratic political and social institutions.[35]

3. Competition Law

Competition law is also referred to as antitrust or *antimonopoly law* or *restrictive business legislation.* The function of competition law is to prevent anti-competitive business practices by firms and to prevent unnecessary government intervention in the market place.[36]

3.1- Competition policy versus competition law

Although competition law is one component of competition policy, competition policy and competition law are not identical. Nor does one stand for the other. Competition policy could be taken as a *positive instrument* because it facilitates competition, while competition law could be regarded as a *negative instrument* because it prevents anti-competitive practices.

In fact, competition law is believed to complement other policies that promote competition by preventing restrictive business practices and by facilitating market access. In this regard, it could be said that the enforcement of competition law is a necessary but not a sufficient condition for maintaining fair competition. This is so because in addition to competition law there are competition enhancing policies which ought to be in place.

Such policies, *inter alia*, include liberalized trade policy, relaxed foreign investment and ownership requirements, economic deregulation and privatization. Thus, microeconomic policies that enhance competition and competition law are two sides of the same coin. Furthermore, it could be said that competition policy is an economic concept whereas competition law is a legal concept. [37]

Competition law mainly targets so-called "*restrictive business practices"* (RBPs). These practices which constitute the main content of competition law are abuse of dominance, anti-competitive arrangements, otherwise called collusion, and mergers and acquisitions.[38] Apart from these practices, some countries provide provisions for unfair competition [39] in their competition laws. For example, the 2003 Ethiopian Trade Practices Proclamation and the 2003 Tanzanian Fair Competition Act address the issue of unfair competition.[40] Even before the 2003 Trade Practices Proclamation came in to

[35] A statement cited at note 8, p. 1-20
[36] Supra, note 2, p. 17
[37] Ibid
[38] Supra, note 11, p. 28-30
[39] Supra, note 30, p. 24
[40] Article 10 of the 2003 Ethiopian Trade Practice Proclamation and article 15 FF of the 2003 Tanzanian Fair Competition Act

force in Ethiopia, the concept of unfair competition was embodied under Articles 130-134 of the 1960 Commercial Code and under Article 2057 of the 1960 Civil Code.

3.2- Abuse of dominance

Distinction has to be made between a legitimate dominant market position and abuse of dominant market position. What the law prohibits is *abusive behavior* but not *dominant position* as such. As it has been rightly maintained, firms could achieve a legitimate dominant market position, for example, through innovation, superior production or distribution methods or through greater entrepreneurial efforts. [41]

The fact that abusive behavior requires the existence of dominant market position is a matter of common knowledge because a market power that does not exist cannot be abused. Equally true is that a specific dominant market position that does not result in abusive behavior is outside the scope of competition law.

The analysis of dominant market position will be meaningful only when it is done with regard to a relevant market. The relevant market for the assessment of a dominant position is the market that comprises all products or services that actually or potentially compete with each other.[42] To define a relevant market is to describe the context for the exercise of market power:- the ability of an enterprise to profitably raise price above competitive levels for a significant period of time.[43]

3.3- Components of market

A market has two components: the *product market* and the *geographic market*[4] The product market describes the goods or services that are bought and sold whereas the geographic market refers to the location of the production or the sale of the product. The whole aim is to determine the extent to which purchasers would switch between alternate products or source of supply[45] in response to a small but significant and non-transitory price increase. In other words, the product market is all about those products or services which consumers would switch to if price of the relevant product or service rose, when that switching prevents prices from rising above the competitive level.[46]

[41] Supra, note 4, P 69

[42] EU Commission Notice on the definition of Relevant Market for the purposes of community competition law (97/C 372/03)

[43] Supra, note 4, P 10

[44] Ibid

[45] Ibid

[46] The U.K Guide line on Abuse of Dominance, Article 3(3)

The geographic market is defined by the buyers' view of the substitutability of products made or sold at various locations.[47] It is believed that if buyers of a product sold at one location were to switch to buying the product from a source at another location in response to a small but significant and non-transitory price increase, then those two locations are in the same geographic market.[48]

Once a relevant market has been defined, it is necessary to establish the existence of a dominant position of a firm, the essence of which is the power to behave independently of competitive pressures. Dominance of market power helps the firm in question to charge higher prices and to engage in some anti-competitive practices which could exclude or deter competition from the market.[49] It is to be noted that the market share of a firm and the existence and the extent of market entry barriers [50] stand out as crucial among the factors which could show the dominant position of a firm.

3.4- Market share and market entry barriers

Production capacity, production volume and sales by value are commonly taken as the most important factors [51] among indicators of market share of a business firm. Under competition laws of some countries, a particular market share (often 40-50%), creates a rebuttable presumption of dominant position.[52] However, it is impossible to set out definite thresholds at which a firm can be judged as having or not having a significant market power.[53] At any rate, the greater the market share of a firm, the more likely is that firm to exercise dominant market power[54].

As indicated above, the existence and the magnitude of market entry barriers are important factors which show whether a firm has a dominant market position. If entry to market is easy and sufficiently profitable, the firm's dominant position will inevitably erode over time.

There are different categories of entry barriers with different effects. There are absolute barriers to entry and there are those which are not absolute. For example, if a business firm has to be licensed before it enters into a certain business activity, the government license serves as an absolute barrier because the firm in question cannot enter into the business without having that license.

[47] Supra, note 4, P 13
[48] Ibid
[49] Supra, note 46, Article 3(9)
[50] Supra, note 4, P 71
[51] Supra, note 8, P 5-148
[52] Ibid
[53] Ibid, 70-71
[54] Ibid

Generally, it can be said that the question of entry is the question of time, money and profit opportunity. There are factors which strengthen the dominant market position of the already existing business firm/s by repelling the new entrants. This is so, where, among other things, entry into a certain business takes a long time and if it requires spending a lot of money, and above all where there is a less or minimal profit opportunity.

3.5- Abusive practices

The following behaviors are commonly considered as abusive and prohibited by competition laws of many countries.

a) Excessive price on a product or a service

Excessive prices that restrain competition must be stopped.[55] But this does not mean that a price of a commodity or a service in a free market economy has to be regulated by the state. Moreover, it does not imply that every price increase is unacceptable because price may increase for different reasons, including surges in demand, high unit costs and exercise of market power.

b) Price discrimination

Where a seller charges different prices according to the profile of the customer but in the absence of appreciable cost differences that might justify different prices,[56] there is said to be price discrimination.

c) RefUsal to deal

Competition law does not generally oblige firms to cooperate with competitors against their will. But the law prohibits refusal to deal in situations where dealing with the competitors does not force the firm in question to incur unnecessary expenses or damages and when the dealing is crucial for the business operation of the other competitors.

d) Tie-in

The fourth abusive practice is what is commonly called the *tie-in* which consists in making the sale of one product conditional upon the purchases of another product. This behavior is seen as abusive only if the firm has a dominant market position, and even when it does, the decision on whether or not the tie-in is abusive requires the analysis of the purpose of the tie-in and the market context.[57]

[55] Supra, note 4, P 73 - 74
[56] Ibid
[57] Ibid, 76

e) Predatory pricing

Under what is called *predatory pricing,* the firm sells its products at prices so low as to drive competitors out of market to prevent new entry and to successfully monopolize the market. At its face value, predation or selling goods or services at unreasonably low prices has nothing wrong in it or may even appear advantageous to the consumers. But predation is condemned not because it results in low prices but because it is likely to lead to reduced output and high prices in the future.[58]

f) Vertical restraints

The sixth commonly prohibited abusive business practices are vertical restraints. Vertical restraints are restrictions that are imposed by the upstream firm (a manufacturer or a wholesaler) on a downstream firm (a retailer). In these restraints, the downstream retailer agrees to limit where it sells the product, or not to sell rival products and, at times, the retailer agrees not to sell below prices established by the manufacturer.[59]

3.6- Regulation of restrictive business agreements

Competition laws of many countries regulate restrictive business agreements as their second component. These agreements are of two types. There are horizontal agreements, that is, agreements between competitors and there are vertical agreements, i.e., agreements between upstream and downstream firms.

Not all horizontal agreements hurt competition. Some horizontal agreements are important for the market because they foster efficiency, reduce risk, create new or improved products or methods of distribution or they may create a better information flow thereby helping the market to be competitive.[60] For example, an agreement between competitors to construct a new plant that none could build independently, to conduct research and development that none could afford independently, to jointly purchase supplies and thereby to reduce their costs, to form a network of suppliers to offer a new product or reduced costs are competitively beneficial to the firms as well as to the market itself.[61]

In contrast, there are horizontal agreements which do impede competition, by restricting output and raising prices. Specifically, there are horizontal agreements that eliminate competition, e.g., price fixing, bid rigging, and alloca-

[58] Ibid, 77 -78
[59] Ibid, 78 - 79
[60] Ibid, 9
[61] Ibid

tion of markets.[62] The following are some of the vertical agreements considered as restrictive and hence prohibited.[63]

- *Resale price maintenance:* It is an agreement where price floors or ceiling are imposed by the manufacturer.
- *Exclusive distribution agreement:* It is an agreement whereby distributors are assigned exclusively within a geographic area or over particular types of clients or over specific products.
- *Exclusive dealing agreement:* It is an agreement whereby downstream firms are prohibited from dealing with competing producers or distributors.
- *Tie-in sale agreement:-* It is an agreement whereby downstream firms are required to purchase a certain range of products before being allowed to purchase a particular product. An extreme example is what is called "Full line forcing", whereby a downstream firm is required to purchase an entire product range.
- *Quantity forcing:* It is an agreement whereby downstream firms are required to purchase a minimum quantity of a product.

3.7- Mergers and acquisitions

The concern of competition law includes mergers and acquisition. The primary concerns on mergers and acquisition emanate from the fact that both can result in the concentration of market power. Sometimes, market structures become more concentrated over time resulting in the success of few firms and in the failure of the rest not because of the competitive efforts by the former but because of mergers or acquisitions. Thus, if it is the concentration of market power that is suspicious, then the rationale for controlling mergers and acquisitions is simple: it is far better to prevent firms from gaining market power than to control the already created power.[64]

There are three categories of mergers: horizontal, vertical and conglomerate.[65] *Horizontal mergers* take place between two firms that are actual or potential competitors, which sell the same products or close substitutes. The term "horizontal" signifies the fact that the two enterprises are at an identical level in the chain of production. *Vertical mergers* take place between firms at different levels in the chain of production. *Such firms* have an actual or potential buyer-seller relationship. *Conglomerate mergers* are neither horizontal nor vertical; they neither produce competing products nor are in an actual or potential buyer-seller relationship.[66] [62] [63] [64]

[62] Ibid, 19 - 20
[63] Ibid , 36 - 3 7
[64] Ibid, 41
[65] Ibid, 42
[66] Ibid

Not all mergers pose a threat to competition in a given market, as some of them are the result of investments by firms with available cash or result from the better use of underutilized enterprise resources; and the impact of other mergers on competition and on consumers is indeed negligible. From those categories of mergers indicated above, horizontal mergers are the most suspect because they tend to reduce the number of independent competitors in a particular market.[67]

If it is more desirable to prevent firms from gaining concentrated market power than attempting to control the same power after its creation, the most effective method is a notification obligation, that is, requiring notification by firms of their intent to merge in advance of consummation. The requirement of such notification is to permit the competition authority to investigate the transaction and, if necessary, to prevent or amend the merger transaction before it becomes effective.[68]

One important point that has to be underlined is that not all mergers need be notified in advance. The requirement to notify all merger cases would create an unnecessary compliance burden on the business community and an excessive workload for the competition authority which has to review every notification. The desirable method to follow is to set a minimum threshold below which mergers should not be reported. The size threshold may be expressed in terms of annual sales (turnover), total assets or both. Additionally, the size of the transaction (the value of the securities or assets to be acquired or merged) and the size of the parties (the minimum size of either party) should be included into the threshold.[69]

3.8- Unfair competition

In a few countries, the competition law includes rules on unfair competition. By unfair competition, the following is understood:

> " Dishonest or fraudulent rivalry in trade and commerce, especially, the practice of endeavoring to pass off one's own goods or products in the market for those of another by means of imitating or counterfeiting the name, brand, size, shape, or other distinctive characteristics of the article or its packaging." [70]

Thus, by its very nature, this practice infringes the intellectual property rights of individuals or individual firms. Yet, its overall impact on competition, a country's economy, or the market in general is said to be minimal. Thus, if the competition authority preoccupies itself with enforcing this field of the competition law, it will spend its time and resources in arbitrating basically [67] [68]

[67] Ibid

[68] Ibid, 56

[69] Ibid

[70] Supra, note 5

private disputes.[71] According to the proponents of this view, the unfair competition cases must be arbitrated by regular courts.

The prohibited behaviors under the notion of unfair competition are:- (1) The distribution of false or misleading information that is capable of harming the business interests of other firms, (2) The distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods, (3) False or misleading comparison of goods in the process of advertising, (4) Fraudulent use of another's trademark, firm name, or product labeling or packaging, (5) Unauthorized receipt, use of dissemination, of confidential, scientific, technical, production, business, or trade information. [72]

4. Competition Authority and Competition Culture

The success of competition policy depends not only on a well drafted piece of legislation, but requires effective enforcement of these provisions. This in its turn necessitates putting in place a proper competition authority and building-up a competition culture. As regards the competition authority, three things are crucial, namely, *independence, powers and resources.*

4.1- Competition Authority

Competition authorities may take one of a number of different structures. The most independent competition authorities are not only administratively separated from the government but they are staffed by competition professionals and they do not rely on the government for their budgetary allocations. On the other hand, the least independent authorities are those which form part of government ministry and therefore are subject to civil service restrictions on recruitment and on central budget allocations in their administrative activities.[73]

The powers of competition authorities may be divided into investigative and adjudicatory. As regards these powers, practices differ from country to country. In countries like Canada, South Africa, Tanzania and Zambia, the investigative power is exercised by one body while the adjudicatory power is exercised by another.[74] On the other hand, the competition authorities of some countries (for example Pakistan) exercise both the investigative and the adju-

Supra, note 4 P. 147

[72] Ibid

[73] Supra, note 11, P 40

[74] UNCTAD Guide book on competition systems (United Nations, New York and Geneva, 2007) pp. 35,135,150,and 159 respectively

dicatory powers.[75] In countries like India, Tanzania and Zambia, the competition authorities have adjudicatory role in the sense that their decisions have a binding force whereas in Kenya this decision-making power is vested with the concerned ministry[76]. The powers granted to competition authorities should include the power of advocacy which is important to create competition culture necessary as a helping hand in the implementation of competition law.

Any government which wants to implement competition law in a meaningful way, has to provide the necessary support for the competition authority. In this regard the level of financial support available and the way it is used is important; but equally important is the man-power. In developing countries, in particular, the shortage of man-power is understandable because there is only a small pool of persons with knowledge of competition related laws or economics or with regulatory experience. But the same cannot be said as regards the shortage of other resources because this problem could be solved over-time as the awareness level of the concerned authorities and/or officials improves.

4.1- Competition Culture

Governments committed to implement competition policy and/or competition law or its competition authority should do their utmost to build up a competition culture, because fair competition cannot develop in its absence. Needless-to-say, competition culture promotes a well regulated market, efficient allocation of resource and production processes in the economy, and stimulates firms to compete with one another in price, in quality and through the innovation of new products. The benefits of this efficiency do not just accrue to firms, but lead to greater value and choice for customers, environmental protection and sustainable development.

Competition culture is made up of a number of elements of which laws form only one part.[77] There are many stakeholders that can contribute to the flourishing of competition culture. Active consumers, responsible business, sensitized media and those other institutions which work in cooperation with the competition authority could be mentioned as examples.[78]

It is to be noted that competition culture is a result of comprehensive, continuous and strenuous advocacy work. Advocacy work targets beyond unfair business practices in the private business sector; and it further aims at solving problems caused by unnecessary public intervention in an economy and

[75] Supra, note 11, P 41
[76] Ibid
[77] Ibid, 23
[78] Ibid, 23 - 24

problems caused by the implementation of state measures which advance private interest .

Moreover, competition advocacy demands the performance of different activities. These activities include performing reviews of existing and proposed laws and regulations, providing advice on state measures that might foster anti competitive practices and associated resource misallocation, conducting outreach activities to educate the public directly through the holding of seminars and the publication of news letters, or indirectly through the media, informing judges and legislators about competition policy related matters, and undertaking studies of actual or potential state measures that may influence market out comes .[79] [80]

Part II- The Case of Ethiopia

Starting from the transitional period, the Ethiopian Government has pledged to enforce free market economic policy and it has reiterated its position in the Trade Practices Proclamation of 2003. The Trade Practices Proclamation (hereinafter the Proclamation) regulates certain areas of competition and has established the Trade Practices Investigation Commission (hereinafter Commission) which became operational starting from September 2004.

But the Ethiopian competition regime is facing a number of problems which need timely attention. These problems could be divided into those emanating from the Proclamation itself and those which do not have any relationship with the Proclamation.

The Proclamation does not offer a complete set of competition rules. Article 6(1) of the Proclamation should be mentioned in this regard in that it omits any reference to forms of collusion other than "written" or "oral" agreements. In order to prevent undertakings from evading the application of Article 6(1) by colluding in a way that falls short of an agreement, other categories of collusive behaviour should be included, that is, the concept of 'concerted practice' and 'decision' by an association of firms or undertakings.[81] Moreover, Article 6(2) of the Proclamation lacks precision and a clear reference to vertical restraint although it prohibits certain collusive behaviors.

[79] Simon J. Evenett, "Competition advocacy: Time for a rethink?" *Northwestern Journal of International Law and Business,* 26: 495 (2006) 497 - 98

[80] Competition advocacy in regulated sectors: Examples of success, Report of the capacity Building and competition policy Implementation working Group, International competition Net work, Seoul, Korea at 47 - 48, cited in a work under note 79.

[81] International Development Law Organization (IDLO) Report on Reviewing the Institutional and Legal Framework for the Development of a Better Competition Law Regime in Ethiopia (2007), 9

The provisions of the Proclamation on abuse of dominance have attracted the attention of many observers and experts. The main problem pointed out by these observers and experts is the absence of a definition of relevant market and dominance in the Proclamation. It may be argued that the title of Article 11 of the Proclamation is an indication for the prohibition of abusing dominant market power. The absence of definition of dominance in the Proclamation has led some observers to interpret Article 11(1) as not prohibiting the abuse of dominant market power at all.[82]

It is true that the content of Article 11 is misleading mainly because the provision does not define relevant market and market power. But in light of its title, the purpose of this article is the prohibition of abusing dominant market power. The argument which does not see any relationship between those prohibited practices under the provision and relevant market and market power is simply foreign to the concepts and notions on abuse of market power. Furthermore, Articles 11(2) (a) and 11(2) (i) are indeed confusing because they share elements of predatory pricing. Furthermore, there seems to be a slip of the pen regarding Article 11(2) (f) of the Proclamation because the proper place for the practices it prohibits is unfair competition but not abuse of dominance.

Whether or not the competition law of different countries provides for mergers and acquisitions has become one major international yardstick to measure the adequacy of those laws. The Trade Practices Proclamation of 2003 does not include provisions on mergers and acquisitions. And, the absence of procedural rules in the Proclamation complicates the problem further.

The Proclamation bundles competition and non-competition provisions. Examples of non-competition provisions are Article 10(2) (h) on anti-dumping and Articles 20 and 21 which are on labeling and price regulation respectively. One obvious problem of this bundling is that it diverts the attention of the competition authority from real competition issues. The other problem is that the non-competition cases could remain unresolved. Moreover, there are problems in the Ethiopian competition regime pertaining to the organizational setup of the Commission, man power, budget and other resources.

The Commission has investigative and adjudicatory powers. The fact that the Commission is entrusted with powers to decide on cases it has investigated, obviously raises the problem of partiality. However, one may contend that there is no issue of bias as long as the parties of the decision can file an appeal with a court. Most competition authorities, at national or at international level (such as the European Commission, US Federal Trade Commission,

[82] Ibid, 10

German competition authorities) decide upon the case they have investigated themselves.

In spite of the Commission's power of investigation, only hearings have been conducted so far. I don't remember any case decided by the Commission which was supported by an investigation which involves fieldwork. One obvious explanation for this problem is lack of necessary manpower. If the investigative problems of the Commission remain unaddressed, the competition or the market problems of the country will remain unaddressed and the competition authority will remain preoccupied with unfair competition cases.

Article 55(4) of the FDRE Constitution entrusts the House of Peoples' Representatives with the power to enact a Commercial Code and what the Proclamation regulates clearly falls within the scope of commerce. In light of this, the Proclamation applies nationwide. But the Commission does not have branch offices in the regional states or at least in some of them.

As a matter of fact the Commission is composed of high ranking government officials. So far, I don't remember any strong case in which the impartiality of the Commission was questioned. But in light of its composition, the fear of partiality cannot be totally ruled out.

The members of the Commission serve on a part-time basis because they have to perform regular duties elsewhere. The Proclamation provides for the establishment of a permanent commission but what we have in practice is a board-like collection of individuals. Until very recently, there were five Commission members and there is only one lawyer.

One of the reasons that explain best the establishment of competition authorities is the desire of having speedy decision on competition cases. While the decisions of the Commission have never been that speedy, they are of a good quality. The report submitted to the World Bank by the International Development Law Organization (IDLO) [83] in March, 2007 alleges that the Commission has received no competition complaints up to now, and that it has not conducted a single competition investigation since its creation.

However, the source of this information is hearsay and the assertion that the Commission has not conducted a single competition enquiry until now is simply false. It is to be noted that *competition enquiry* in the course of adjudication is different from *investigation* (which includes field work). It is true that many of the cases decided by the Commission during the period in question were related to unfair competition cases. But there were competition cases as well.

[83] Ibid, 8

The Commission is accountable to the Minister of Trade and Industry as far as its decisions are concerned. This is so because Sub-articles (2) and (3) of Article 15 of the Proclamation provide that any administrative measures or penalty must be approved by the Minister. The accountability of the Commission to the Minister regarding planning and reporting is somewhat acceptable; but to make the Commission accountable to the Minister in matters pertaining to its decisions utterly erodes the Commission's independence.

Situations could arise where the Ministry of Trade and Industry appears before the Commission as a party. To give the final say of approval to the Minister on a case in which the Ministry is involved as a party, totally undermines the impartiality of the system and defeats the whole notion of justice. For example, in a case involving the export of *teff,* Ministry of Trade and Industry was a plaintiff.

The Commission does not have its own secretariat because Article 2(9) of the Proclamation designates a department under the organizational structure of the Ministry to fulfil this task. The problem as regards this arrangement is that the members of this department are not accountable to the Commission and they are not in a position to give proper service to the Commission. This is partly due to shortage of resources and lack of experience.

The Commission has two lawyers and one economist on a full-time basis and one more lawyer as a part-timer. But none of them had previous training in competition economics or competition law. The Commission does not have its own budget either. Though there has been some progress regarding the provision of resources, much remains to be done in this area as well.

Conclusion

Development is incomplete without implementing competition policy and/or competition law; and endeavors to build a democratic system are incomplete without market reform. Therefore when we talk about competition policy and/or competition law, we are in other words talking about development, and serious development endeavors presuppose the implementation of competition policy and/or competition law.

Competition (either negatively or positively) affects business, consumers, as well as the whole nation. And more importantly, all of us are consumers in one way or the other. Thus, we ought to join hands and work towards the proper implementation of competition policy and/or competition law.

The Ethiopian competition regime is in a very bad state and it must be rescued very soon. The only way to do it is to put in place an adequate competition law and a truly independent and strong competition commission and a competition tribunal.

It was as far back as 1889 and 1890 that Canada and USA, respectively, laid strong foundations for a proper competition regime. If Ethiopia cannot do so after over a century, we need to indeed take the blame. Until Ethiopia's competition regime is comprehensively addressed, the business community, consumers of goods and services, and the transitional economy at large are bound to steadily encounter the pitfalls of inadequate competition laws and insufficient regulatory mechanisms. ---------------- ■